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358-024—69——1

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

WOODCREST CONSTRUCTION COMPANY, INC. AND THE HOME INDEMNITY COMPANY

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the opinion and order[1] of the United States Court of Claims entered in this case on March 14, 1969.

### OPINION BELOW

The opinion and order of the Court of Claims (App. 15–28) is reported at 408 F. 2d 406. The opinion of the Court of Claims' Trial Commissioner (App. 29–46) is unreported. The opinion and findings of the Corps

[1] Although the decision of the Court of Claims is interlocutory in the sense that it does not finally grant or deny relief, but simply remands for computation of the amount of recovery, this Court has jurisdiction under 28 U.S.C. 1255(1). *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155; *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138.

of Engineers Board of Contract Appeals (App. 47-66) are reported at 66-2 BCA ¶ 5726.

## JURISDICTION

The opinion and order of the Court of Claims was entered on March 14, 1969. By order of June 4, 1969, the Chief Justice extended the time for filing a petition for a writ of certiorari to July 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether the Court of Claims exceeded the scope of review permitted it by the Wunderlich Act on review of factual findings of government boards of contract appeals.

## STATUTE INVOLVED

The Wunderlich Act, Act of May 11, 1954, c. 199, 68 Stat. 81, 41 U.S.C. 321, provides in relevant part:

> Limitation on pleading contract-provisions relating to finality; standards of review.
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representatives or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly

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erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

## STATEMENT

On September 24, 1963, Woodcrest Construction Company was awarded a fixed price contract by the Corps of Engineers for modifications and additions to the Central Control Building and Telephone Exchange Building at Cape Kennedy, Florida. Shortly after work was begun a subsurface water condition was encountered. Woodcrest filed a claim under the disputes clause of its contract, alleging that logs of test borings furnished by the government had led it to believe that subsurface water would not be encountered and seeking reimbursement for the expense the water occasioned. The Corps of Engineers Board of Contract Appeals denied the claim, finding that Woodcrest knew or should have known of the subsurface water condition at the time of bidding, and therefore had not been misled by the test boring logs. The Court of Claims reversed the decision of the Board of Contract Appeals, holding that the Board's finding was not supported by substantial evidence.

The construction projects involved here were to be built on flat sandy terrain, about two miles from the ocean and half a mile from the Banana River, on the long, thin strip of land that runs down the east coast of Florida. The site was only about ten feet above water level (App. 53). Prior to the bidding, the government had made test borings at the sites to determine the composition of the soil (Tr. 22)[2]; it

[2] "Tr." refers to the transcript of proceedings before the Board.

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found, and informed the bidders, that it was sandy down to a point well below sea level (App. 33–34). It also found a water table, at about three feet above sea level (*Ibid.*), but, apparently through inadvertence, neglected to include this data in its bidding documents. The issue before the Board was whether Woodcrest was misled by this omission, or knew or should have known that ground water was likely to be encountered in sandy soil located that close to a river and the sea.

The government's evidence tended to show that the information and specifications which were furnished to the bidders would have alerted a contractor to the presence of ground water. Thus, the plans provided that at the footing of one structure there was to be a waterstop, a 5 ply waterproof membrane, and a two inch bedding layer of concrete. (Tr. 578). The government's expert witness stated:

> I would expect water there, and when I see things like a waterstop and 5-ply waterproof membranes, I know then that someone had in mind that there was water there and it would in the construction of this have to be taken care of. * * * The waterproof membrane * * * is only used where it is anticipated that protection from water is needed. [Tr. 579.]

The plans also provided that the bottom portion of an elevator shaft would have an application of 5 ply waterproof membrane in a 2 inch concrete working or mud slab; the same expert witness testified that this indicated a need for protection against water. (Tr. 581). Also, the plans showed cable ducts sloping to the manholes, so that water which entered them

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could be pumped out. (Tr. 582–583).[3] In opposition to this testimony, the contractor's expert witness testified that on the basis of the plans and specifications given the contractor, he would not have considered dewatering the area. (Tr. 247).

Moreover, the government's evidence also showed that the contractor himself had an obligation of inspection to ascertain the water level before entering into a contract. Since Corps of Engineers manuals require that the foundations of buildings must be dry, contractors normally check the lowest point at which structures are to be built for water (Tr. 576). The provisions of this contract, in particular, drew attention to the need for such an inspection:

> The contractor further acknowledges he has satisfied himself as to the character, quality and quantity of subsurface materials or obstacles to be encountered insofar as the information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the government as well as from information presented by the drawings and specifications made a part of this contract. [Govt. Ex. B, Vol. I, p. GC–1, ¶ GC–3.]

Since the test borings extended more than twenty feet below sea level in very close proximity to water, and yet showed no water at any point, it must have been apparent that there had been an omission; such a bor-

[3] On cross-examination, this expert witness was asked if the waterproofing material required by the plans might not have been for protection against rainwater instead of subsurface water. The witness replied that it was not common practice to waterproof all foundations in order to protect them from rainwater. (Tr. 596–597).

ing could not have been entirely dry. The Board found, however, that Woodcrest's

> prebid site investigation was limited to a hasty visit by a Mr. Tepper on the day before bid opening. Mr. Tepper was a friend of Harvey Borsuk, Vice President of Woodcrest. He was a marketing representative for Westinghouse Corporation dealing with NASA at Cape Canaveral. He had a degree in electrical engineering but, apparently no experience in subsurface aspects of building construction. * * * Tepper made the inspection in a very few minutes on his way to work at the Westinghouse office. [App. 50-51.]

Mr. Tepper reported that the area was dry and appeared normal (Tr. 133).[4]

Other evidence tended to show both that the contractor was familiar with construction in the area and that the type of conditions he was likely to encounter would almost certainly include ground water above

---

[4] At the Board hearing, an expert on geology and soils testified as to an inspection he made of the construction site:

> The things that one is aware of is that there is a flat terrain and that there is water within sight on both sides. * * * anyone can see * * * that he is no more than a few feet above the surface of the water. [Tr. 569-570.]
>
> Having looked over the site then, I would find that even though there may have been no water on the surface, that the material was sandy. It appeared to drain well and I would expect that most of what fell on the surface would enter the ground and establish the water at some elevation above the elevation of the ocean, which is the only low point to which this can drain. [Tr. 575.]

The witness referred to a child digging in the sand on the beach to explain the capillary action of water in sand. If dry sand is placed in a bucket with water in it, "the water will creep up through the sand." (Tr. 571.)

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sea level. Thus, Woodcrest's President, Mr. Borsuk, testified that he was very familiar with Florida, having done construction work in Miami, Fort Lauderdale, Dania, Hollywood and Key West. He had seen a number of drawings for construction jobs on nearby Merritt Island, all of which showed a water problem. (Tr. 74, 76). He knew that the ocean was about 2 miles away, that there were rivers about a mile away, and that from 8.4 feet above sea level to 27 below the soil was sandy, which means it absorbs water (Tr. 81–82). The contractor's expert witness conceded that, given the construction site involved, he would have advised Borsuk that he would have to dewater the whole area. (Tr. 256).[4] Two of the government's engineers, Garnett (Tr. 350), and Safriet (Tr. 430), stated that from their experience at the Cape they would have expected that water would be present. And see n. 4, *supra*.

Finally, there was evidence to justify a finding that Woodcrest had in fact prepared for dewatering before it first encountered subsurface water. Woodcrest ordered pumping equipment to dewater the area on October 18 (Tr. 70–71). Woodcrest's President testified that water was first encountered on October 14, 1963, at a depth of three feet above sea level, but his testimony was based on his memory because Woodcrest did not have a daily written record until October 25 (Tr. 69). The government's daily logs, which were more comprehensive, showed that water was first discovered on October 23. The Board of Contract Appeals accepted the government's date, which meant

[4] This witness, however, said he would not have expected water on the basis of the contract plans (Tr. 256).

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that Woodcrest had ordered dewatering equipmen
five days before it claimed to have discovered wate
(App. 51–52.)*

The Board of Contract Appeals denied the con
tractor's claim, finding the following facts:

> Although he did not make a personal prebi
> investigation, he must have known that th
> project site was almost completely surrounde
> by considerable bodies of water, viz., the Ba
> nana River and the Atlantic Ocean. The projec
> site was on flat, sandy terrain located about
> miles from the ocean and ½ mile from the Ba
> nana River. Ground elevation at the site wa
> approximately 10 ft. above sea level. The proj
> ect required excavation in certain areas t
> depths near or below sea level. The logs of bor
> ings showed sand to a depth of approximatel
> 30 ft. It is quite elementary hydrologic knowl
> edge that water percolates sidewise throug
> sand as well as down and that capillary actio
> causes water to creep up through sand to
> level above sea level. Water was visible i
> ditches along the roadways leading to the site
> The existence of ground water at high eleva
> tions was common knowledge among construc
> tion contractors who had worked on the Cape
> as well as Government representatives involve
> in construction work there. In spite of all thes
> indications which we think would have led

* Woodcrest also included an item for dewatering equipmen
on a schedule of work for the job, to be ordered October
1963. (Tr. 170). Harvey Borsuk, Woodcrest's Vice-Presiden
explained this by saying that it was a provision for an unfor
seen contingency. On the next schedule the dewatering plan w
eliminated because of an order to eliminate extra items. (T
171–172).

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> reasonably prudent prospective bidder to wonder seriously about the presence of water, the record fails to disclose any inquiry made by appellant as to its existence. [App. 53–54.]

Although its Trial Commissioner had found that the Board's findings were supported by substantial evidence (App. 29–46), a bare majority of the Court of Claims held that they were not so supported. The majority found that the expert testimony on which the Board had relied was overcome by the boring logs (App. 20):

> The "experts" who stated that subsurface water should have been anticipated based their opinion on their own personal knowledge of the area. When this "general" knowledge is lined up against the boring logs, it is difficult to conclude that plaintiff, had he sought out the experts, should have believed them rather than the logs. The experts could only testify that there was a *possibility* of subsurface water; the borings, however, showed none. * * *

Moreover, although testimony indicated that only a portion of the construction area descended deeply enough to reach the water table (Tr. 435, 453–455; App. 53), and that exterior as well as interior portions were affected (App. 51–52), the court found significance in the fact that (App. 17–18)

> only one-third of the area of the addition to the Telephone Exchange Building required dewatering, and that a mere one-tenth of the area of the Central Building addition required such an operation. * * * * By and large, the area did

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> not have subsurface water under it, and how plaintiff should have known of such a "condition" is not demonstrated by the facts. An attempt to show that there may have been a subsurface water condition in order to prove what plaintiff should have known, flies in the face of the fact that in general, the condition did not exist.

Finally, the court rejected as unwarranted any inferences from the other factors mentioned—the contract provision for draining and waterproofing, and the contractor's action in ordering pumping equipment before he discovered the subsurface water; despite the contrary testimony (*supra* n. 3), it regarded those factors as equally consistent with provisions against rainfall (App. 18).

The three dissenting judges concluded that the Board's opinion was supported by substantial evidence, and should therefore be affirmed under the Wunderlich Act.

### REASONS FOR GRANTING THE WRIT

As the three dissents below make plain, this case presents a serious question of conformity with the Wunderlich Act, 41 U.S.C. 321, which limits judicial review of findings made by administrative contract boards under the standard disputes clause of government contracts to a determination whether or not they are supported by substantial evidence. We recognize, of course, that this question would not ordinarily warrant review, however egregious the error, under the standards set out in Rule 19 of the Rules of this Court. However, in our petition for a writ of certio-

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rari to review the decision in *Urban Plumbing & Heating Co.* v. *United States,* 408 F.2d 382 (Ct. Cl.), (filed together with this petition), we show that there has developed a pattern of Court of Claims decisions in effect assuming, under the guise of the substantial evidence rule, the function of finding the facts in government contract cases despite the clear prohibition of the Wunderlich Act. *United States* v. *Carlo Bianchi & Co.,* 373 U.S. 709; *United States* v. *Anthony Grace & Sons, Inc.,* 384 U.S. 424. This trend, we believe, does warrant this Court's attention, and we present this case as another aspect of the problem aired in *Urban.* There, the court ignored the evidence supporting the administrative findings; here, it explicitly weighed anew conflicting evidence in the administrative record.

The Court of Claims clearly erred in finding no substantial evidence to support the administrative finding that the contractor knew or should have known of the danger of encountering subsurface water. An expert witness testified, after inspection of the construction site, that "I would expect surely that [the water level] would have been some place above zero.[1] *This would happen any place in the world under this given set of circumstances"* (Tr. 571; emphasis added). This testimony—together with the contractor's conceded experience (Tr. 76, 77–78), the sandy nature of the terrain and its proximity to the ocean and a river, and the provisions in the plans and speci-

[1] By "zero," the witness was referring to sea level. In fact, the subsurface water was encountered at slightly over three feet above sea level. (App. 50.)

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fications for waterproofing of foundation structures (Tr. 81, 578, 579, 581, 582–583)—certainly provides a reasonable foundation for the administrative finding that the contractor should have suspected a mistake in the borings. And the contractor's purchase of pumping equipment before the subsurface water was encountered supports the finding that he actually did suspect that this condition might exist.

The Court of Claims read the expert testimony as showing merely "general" knowledge of a "possibility" of water, which could be disregarded in light of the borings. However, it was clearly reasonable for the Board to read this testimony in another light. The Court of Claims also discounted the expert testimony on the ground that subsurface water was encountered in only a fraction of the construction area;[8] in the court's view, this showed that "in general, the condition did not exist," contrary to the expert testimony that a general subsurface water condition could be expected. But in drawing this conclusion, the court simply ignored evidence that in only a fraction of the construction area did the construction work go down to the level of the water table. And finally, the court discounted the contract specifications providing for waterproofing of foundation structures, by stating that they "could just as easily have been referring to operations necessitated by rainfall"; the court thereby ignored expert testimony that it was not common practice to waterproof foundation structures to protect them from rainwater. (Tr. 596–597). By ignoring testi-

[8] A larger fraction, however, than is indicated in the court's opinion. See pp. 9–10, *supra*, and accompanying text.

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mony that conflicted with its view of the case, and discounting expert testimony which the Board accepted and which reasonably could be accepted in light of all the evidence in the case, the Court of Claims clearly intruded into the fact finder's domain, and transgressed the limitations on judicial review set forth in the Wunderlich Act.

It is apparent that the court misapprehended this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, which it cited in support of its approach. *Universal Camera* does require the reviewing court to look to the record as a whole in determining whether the administrative decision has substantial support—not merely to that part of the record which supports the decision. However, this Court cautioned in that opinion that review on the basis of the whole record does not mean that "a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" 340 U.S. at 488. By utilizing the substantial evidence standard as a license for *de novo* review in a case where the administrative decision is supported by a "fair estimate of the worth of the testimony," the Court of Claims has either "misapprehended" or "grossly misapplied" that standard. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490, 491.

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## CONCLUSION

This petition for a writ of certiorari should be granted and set for argument together with the petition in *Urban Plumbing & Heating Co.* v. *United States.*

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

WILLIAM D. RUCKELSHAUS,
*Assistant Attorney General.*

ROBERT V. ZENER,
*Attorney.*

JULY 1969.

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# APPENDIX A

## In the United States Court of Claims

No. 32-67
(Decided March 14, 1969)

WOODCREST CONSTRUCTION COMPANY, INC. and THE HOME INDEMNITY COMPANY, AS COMPLETING SURETY v. THE UNITED STATES

*Albert Foreman*, attorney of record, for plaintiffs. *M. Carl Levine*, *Morgulas & Foreman*, of counsel.

*Douglas M. Smith*, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant. *H. Thomas Greene*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

DURFEE, *Judge*, delivered the opinion of the court:*

The contract herein was basically a unit price contract for the construction of modifications and additions to the Central Control Building and the Telephone Exchange Building at the Cape Canaveral (now Cape Kennedy) Missile Test Annex at Patrick Air Force Base, Florida. After a number of contract modifications and time extensions, Woodcrest's contract was terminated for default, and the Home Indemnity

*This opinion incorporates portions of the opinion prepared by Commissioner Mastin G. White. With respect to the "Changed Conditions," the court reaches a different result from that of the Commissioner. The facts are stated in the opinion.



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Company, Woodcrest's surety, completed the job. Because of alleged late completions, the contracting officer withheld specified liquidated damages from Woodcrest's and Home Indemnity's progress payments.

Plaintiffs have four separate causes of action. The determinations of the contracting officer were appealed to the Corps of Engineers Board of Contract Appeals, which rendered a decision affirming the contracting officer's findings. This decision was appealed to the Board of Contract Appeals, but that Board dismissed the appeal on the ground that the appeal to the Corps of Engineers Board of Contract Appeals was the last administrative appeal authorized under the contract. Thus, plaintiff is here attacking the decision of the Corps of Engineers Board of Contract Appeals as not supported by substantial evidence. Since there are several causes of action, we will discuss each one separately.

## I—"*Changed Conditions*" *Claim*

On July 15, 1966, the Corps of Engineers Board of Contract Appeals (hereinafter referred to as the BCA) denied Woodcrest's appeal on the "Changed Conditions" cause of action. Woodcrest claimed that the information contained in the bidding documents was false and erroneous since it didn't disclose subsurface water on the site which would require extensive pumping and dewatering operations. It claims that it relied on the information it received, and that when it later discovered the subsurface water, it notified defendant, in accordance with Article 4 of the contract. The contracting officer disallowed the claim for additional compensation. Woodcrest proceeded under protest, but requested an extension of time to perform the work required by the contract. Defendant denied the request, and insisted that Woodcrest maintain the performance schedule. Woodcrest claims that it was thus required to incur increased expenses, for which it now seeks reimbursement.

The denial of the appeal by the BCA was based on the conclusion that plaintiff knew or should have known of the existence of a high ground-water table at the project site, and thus it was not misled by defendant's erroneous failure to show the ground-water table on the core boring logs.

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Although there may be some evidence to support this conclusion that plaintiff knew or should have known of the existence of a high ground-water level, we think the particular facts of this case make such a Board finding erroneous in that the supporting evidence is not substantial.

Since the claim is one "under" the contract, the suit is governed by the Wunderlich Act, 41 U.S.C. §§ 321–322 (1964), which accords finality to a Board's decision on matters covered by a Disputes Clause unless it is "fraudulent or capricious or arbitrary or so grossly erroneous as to imply bad faith, or is not supported by substantial evidence." This court's scope of review under the Wunderlich Act is the same as that of Federal courts of appeals under the standards of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951). See *Carlo Bianchi and Co., Inc.* v. *United States*, 167 Ct. Cl. 364 (1964), *cert. denied* 382 U.S. 841 (1965).

In *Universal Camera*, *supra*, the issue was the reviewability of orders of the NLRB in light of the Administrative Procedure Act and the Taft-Hartley Act. The test enunciated was whether there was substantial evidence on the record *considered as a whole*. In the instant case, there is not substantial evidence that plaintiff "knew" that there was a high ground-water level. In addition, the relatively small area actually affected by the high ground-water level militates against a finding that plaintiff "should have known" of the general presence of high ground-water level or of the danger that it may have been present.

The BCA found that only one-third of the area of the addition to the Telephone Exchange Building required dewatering, and that a mere one-tenth of the area of the Central Building addition required such an operation. In view of this fact, what was said in *Universal Camera*, *supra*, has special relevance:

> * * * The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. * * * *Id.* at 488.

By and large, the area did not have subsurface water under it, and how plaintiff should have known of such a "condition" is not demonstrated by the facts. An attempt to show that there may have been a subsurface water condition in

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order to prove what plaintiff should have known, flies in the face of the fact that in general, the condition did not exist.

In *Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 712, 345 F. 2d 535 (1965), the court held that plaintiff, having been warned about the likelihood of encountering permafrost on the excavation project, and having been furnished with information which should have alerted him to the existence of permafrost below the ground, was aware that some permafrost would be encountered. The court stated:

> * * * These data furnished by the defendant to the plaintiff in connection with the bid papers were clearly sufficient to indicate to a reasonably prudent bidder that permafrost was widespread in the area of the two excavation sites and might well be encountered in performing the excavation work at the two sites, * * *. *Id.* at 722.

Had the Government core borings correctly indicated that ground water was present, we could say that plaintiff should have known of subsurface conditions.

The Government argues that although it may have misled plaintiff, the contract specifications as a whole, in addition to general knowledge and expert knowledge readily available to plaintiff, should have put plaintiff on the alert. The Board, in denying plaintiff's appeal on this point, made the same argument, when it said that:

> * * * there were so many factors known or readily available to appellant on which the presence of a high water table could have been predicted, that appellant knew or should have known of the existence thereof. 66-2 BCA, ¶ 5726, at p. 26,696.

In looking at the various contract provisions, we are not convinced that the existence of a high water table must necessarily follow from them. The reference to draining and dewatering in the contract could just as easily have been referring to operations necessitated by rainfall; moreover, the dewatering equipment ordered by plaintiff could be used to remove rainwater as well as a high water table's subsurface water. Assuming however, that one could just as easily have inferred the possibility of rainwater from the various contract provisions as easily as one could have inferred the presence of a high water table and subsurface water, it is our

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belief that the inescapable impression given by the core boring logs furnished bidders by the Government could have led to only one conclusion—that there was no subsurface condition. The BCA concluded otherwise, but we are not always bound by their decision. The Supreme Court stated:

> * * * Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. *Universal Camera Corp.*, *supra*, at 488.

There are a number of reasons why the Government provides information to contractors. One reason is to provide a basis for a more accurate bid. Thus, when the contractor is presented with specifications which may or may not indicate a subsurface condition, and, in addition, is presented with boring logs showing that *no* subsurface water was encountered, we cannot conclude that the contractor should have known of such a condition, especially since the main purpose of such borings is to indicate subsurface conditions which would not otherwise be discovered.

Although no actual representation was made by the Government that there was no ground water, and thus, we cannot say that there was a warranty, the effect upon the contractor of furnishing core boring logs without indicating the ground water shown by such borings may be the same as if a representation had been made. In *Atlantic Dredging Co.* v. *United States*, 53 Ct. Cl. 490 (1918) *aff'd* 253 U.S. 1 (1920), a map was furnished by the Government to plaintiff. The legends on the map did not contain a true description of the material to be dredged, as encountered when the borings were made. The specifications stated that the material to be dredged was of a certain kind, whereas, in reality, and as shown by the borings, they were of a different kind, and thus more expensive to dredge. Here, the logs furnished the bidder showed no subsurface water, and a contractor's assumption that therefore there was no subsurface water is only one step removed from an actual representation by the Government to that effect. In a situation such as we have here, where test results are shown, and they are contrary to what the Gov-

ernment knows to be true, what this court said in *Atlantic Dredging Co., supra*, applies as well:

> * * * It seems to the court that the bidder had a right to rely on information so given, * * *. *Id.* at 502.

The effect of an actual representation is to make the statements of the Government binding upon it, despite exculpatory clauses which do not guarantee the accuracy of a description. *Id.* at 503. Here, although there is no statement which can be made binding upon the Government, there was in effect a description of the site, upon which plaintiff had a right to rely, and by which it was misled. Nor does the exculpatory clause in the instant case absolve the Government, since:

> * * * broad exculpatory clauses * * * cannot be given their full literal reach, and "do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate." *Fehlhaber Corp.* v. *United States*, 138 Ct. Cl. 571, 584, 151 F. Supp. 817, 825 (1957), *cert. denied*, 355 U.S. 877. As *Fehlhaber* said, general portions of the specifications should not lightly be read to override the Changed Conditions clause. *Ibid. United Contractors, et al.* v. *United States*, 177 Ct. Cl. 151, 165–66, 368 F. 2d 585, 598 (1966).

The expert knowledge available to plaintiff was not so persuasive and consistent that plaintiff should have followed it, much less sought it. The "experts" who stated that subsurface water should have been anticipated based their opinion on their own personal knowledge of the area. When this "general" knowledge is lined up against the boring logs, it is difficult to conclude that plaintiff, had he sought out the experts, should have believed them rather than the logs. The experts could only testify that there was a *possibility* of subsurface water; the borings, however, showed none. We cannot say that plaintiff was wrong in following "The most reliable and most specific indicator—the borings— * * *." See, *United Contractors, et al., supra*, at 166–67.

In view of the fact that the misleading boring logs would lead a contractor to conclude that there was no ground water, when coupled with other evidence which was inconclusive either way, we find that the BCA's determination that plain-

tiff knew or should have known is not supported by substantial evidence. Accordingly, on the "Changed Conditions" cause of action, we find that plaintiff was entitled to an extension of time.

### II—*"Changes" Claims*

In its opinion dated July 15, 1966, the Corps of Engineers Board of Contract Apeals also rendered decisions on claims submitted by Woodcrest under allegations that, as the result of erroneous interpretations by the defendant's personnel of contract drawings or specifications, Woodcrest had been required to do extra work, or to use types of materials, not contemplated by the pertinent contract drawings or specifications, as properly interpreted. These claims sought increases in the contract price and also time extensions for the performance of the work under the contract (with resulting diminutions of the liquidated damages assessed by the defendant because of delay in the completion of the work).

The claims mentioned in the preceding paragraph were apparently for "equitable adjustments" under the "Changes" provision of the contract. This provision stated in part as follows:

> The Contracting Officer may, at any time, by written order * * * make charges in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. * * * If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions [relating to "Disputes"] * * *.

Although the contracting officer did not, as contemplated in the "Changes" provision, issue written change orders with respect to the matters now under consideration, it was evidently Woodcrest's theory that the extra items of work, or the more expensive materials, required of it as a result of the allegedly erroneous interpretations of contract drawings or specifications should be regarded as flowing from constructive changes in the pertinent contract drawings or specifica-

tions and, therefore, as compensable under the "Changes" provision of the contract. *Cf. The Jack Stone Co.* v. *United States*, 170 Ct. Cl. 281, 291–292, 344 F. 2d 370, 376 (1965); *Gholson, Byars and Holmes Construction Co.* v. *United States*, 173 Ct. Cl. 374, 388–390, 351 F. 2d 987, 994–996 (1965); *Turnbull, Inc.* v. *United States*, 180 Ct. Cl. 1010, 1020, 389 F. 2d 1007, 1012 (1967).

Woodcrest's "changes" claims were denied by the Corps of Engineers Board of Contract Appeals on July 15, 1966. As the Board's decisions on these claims involved (with one exception) the interpretation of contract drawings or specifications, the administrative decisions related to questions of law, and the Board's decisions are not binding on the court, which is authorized by the second section of the Wunderlich Act (41 U.S.C. § 322 (1964)) to consider these legal questions *de novo*. *Schmid* v. *United States*, 173 Ct. Cl. 302, 309, 351 F. 2d 651, 654 (1965); *Merritt-Chapman & Scott Corp.* v. *United States*, 174 Ct. Cl. 250, 254, 355 F. 2d 622, 624 (1966).

The several "changes" claims will be discussed separately in subsequent paragraphs of this opinion.

*Manholes:* One of Woodcrest's "changes" claims involved the question of whether the contract drawings, as properly interpreted, called upon Woodcrest to construct a couple of communication manholes, designated as C–1 and C–4.

The contract, in addition to calling for the construction of additions to the Central Control Building and the Telephone Exchange Building, also involved the construction of certain related works. Among these were some communication ducts and manholes.

The invitation for bids which the defendant furnished to Woodcrest and others prior to the submission of bids on the proposed contract included numerous drawings relating to the work that was to be performed under the contract. These drawings were subsequently incorporated in, and became part of, the contract.

Sheet 1 of the contract drawings contained (among other things) a legend that explained the meaning of various symbols used on other contract drawings. In connection with "Communication Ducts & Manhole," the legend indicated that the symbol for an "existing" communication manhole was a small square with the inner space clear, and that the

symbol for a "new" communication manhole was a small square with the inner space cross-hatched.

Sheet 2 of the contract drawings was denominated the "Site Plan." This sheet depicted (among other things) small squares that symbolized four communication manholes, Nos. C–2, C–3, C–4, and C–5. The squares symbolizing Nos. C–2, C–3, and C–5 were cross-hatched, thus indicating that these were "new" communication manholes. The symbol for No. C–4 was clear, thus indicating that this was an "existing" manhole.

Sheet 33 of the contract drawings was denominated "Communication Distribution." This sheet contained (among other things) diagrams indicating the manner of construction for five communication manholes, Nos. C–1, C–2, C–3, C–4, and C–5.

In the presentation of this particular claim, Woodcrest asserted before the Corps of Engineers Board of Contract Appeals that in the preparation of its bid, it relied on sheet 2 of the drawings as showing that communication manholes Nos. C–2, C–3, and C–5 were "new" and were to be constructed under the contract, as showing that manhole No. C–4 was an "existing" facility and was thus outside the scope of the contract, and as implying that manhole No. C–1 was an "existing" facility since it was not shown on the site plan. However, it subsequently turned out that communication manholes Nos. C–1 and C–4 were not in existence, and Woodcrest was required by the defendant to construct these manholes. To Woodcrest, this amounted to extra work which entitled it to additional compensation and additional time for the completion of the contract. However, the Board denied the claim, holding that "Sheet 33 was the controlling drawing for construction of the manhole system."

In this case, there was an obvious discrepancy between, on the one hand, sheet 2 of the contract drawings—the "Site Plan"—which clearly indicated that communication manhole No. C–4 was an "existing" facility and omitted No. C–1, and, on the other hand, sheet 33—relating to "Communication Distribution—which furnished instructions concerning the manner in which communication manholes Nos. C–1 and C–4 were to be constructed and thus clearly indicated that they were within the scope of the work to be performed under the con-

tract. In such a situation, it was incumbent upon Woodcrest, in connection with the submission of its bid, to obtain a clarification from the defendant by making an inquiry as to whether communication manholes Nos. C–1 and C–4 were actually in existence and thus outside the scope of the work to be done under the contract, or whether these were new facilities which the successful bidder would be expected to construct under the contract. *Beacon Construction Co.* v. *United States*, 161 Ct. Cl. 1, 7, 314 F. 2d 501, 504 (1963); see *Blount Bros. Construction Co.* v. *United States*, 171 Ct. Cl. 478, 496, 346 F. 2d 962, 972–973 (1965).

Under the circumstances, it appears that the court would not be justified in overruling the reasonable administrative interpretation to the effect that sheet 33 of the contract drawings, which related specifically to the communication system, "was the controlling drawing for construction of the manhole system."

*Chair Covering:* The addition to the Central Control Building was to contain a theater, with chairs installed by Woodcrest. One of Woodcrest's "Changes" claims involved the question of whether certain technical provisions in the contract specifications, as properly interpreted, made it necessary for Woodcrest to afford the defendant an opportunity to select the fabric for use as the covering for the theater chairs.

Section 37 of the technical provisions related to "Seating." The introductory portion of paragraph 37–02, dealing with "Materials," declared that:

> Chairs shall be constructed as here-in after [sic] specified or equal to TC–616 SCHOLASTIC chairs as manufactured by Heywood-Wakefield Company, Menomince [sic], Michigan.

Subparagraph "b" of paragraph 37–02 provided in part as follows:

> The back shall consist of two parts—*upholstered panel* and metal back. The *upholstered panel* shall be of plywood * * * and covered with a 3" wide layer of felted cotton extending across the top and down both sides securely fastened to plywood. The entire front surface of plywood shall then be covered with a rubberized curled hair pad one inch in thickness overall, and with a rub-

berized wool topper approximately ¼" thick, *and the selected upholstering fabric.* * * * [Emphasis supplied.]

Paragraph 37–03 required that shop drawings be submitted for approval, and further said that "Drawings shall include shop and erection drawings, including * * * *type of fabric* * * *" (emphasis supplied).

Paragraph 37–04 provided that "Samples as required shall be submitted to the Contracting Officer for approval."

Woodcrest proposed to furnish the TC–616 SCHOLASTIC chairs manufactured by the Heywood-Wakefield Company. The manufacturer produced this chair as a standard item with a muslin covering, and also produced it at a slightly higher price with a rather wide choice of fabrics for the covering. Woodcrest desired to use the standard chair with the muslin covering, but the defendant insisted that it had the right under the pertinent technical provisions to select a fabric for the chair covering. Woodcrest was ultimately required to provide theater chairs with a covering made of fabric selected by the defendant.

The Corps of Engineers Board of Contract Appeals denied Woodcrest's claim for an increase in the contract price because of the requirement that the more expensive fabric be used as the covering for the theater chairs.

The Board's interpretation of the pertinent technical provisions was proper. Paragraph 37–03 clearly indicated that the shop drawings should include a proposed "type of fabric" for the approval of the defendant, and subparagraph "b" of paragraph 37–02 provided for the use of "the selected upholstering fabric."

*Duct Bank:* Another of the "changes" claims sought an increase in the contract price and a time extension on the basis of allegations that after Woodcrest had drilled the holes for a duct bank in the cable vault of the addition to the Telephone Exchange Building, it was required by the defendant to redrill the holes and reinstall the ducts.

The Corps of Engineers Board of Contract Appeals denied this claim on the ground that the original installation of the duct bank was not accomplished in accordance with the requirements of the pertinent contract drawing.

The plaintiffs, in their motion and supporting memorandum, have not pointed out in what respect the administrative decision on this point is erroneous, and the portions of the administrative record examined do not disclose any proper basis on which the decision could be overruled.

*Asbestos-Cement Sheets:* In another claim, Woodcrest sought from the administrative agency an increase in the contract price and a time extension because the contract specifications called for a type of asbestos-cement material that was no longer being manufactured, and it was necessary to use a substitute material.

The contract specifications called for the use of asbestos-cement sheets conforming to Federal Specification SS–S–283. After Woodcrest began the performance of the work under the contract, it was learned that Federal Specification SS–S–283, which related to a solid asbestos-cement sheet, had been superseded by Federal Specification SS–B–755, which related to a perforated asbestos-cement sheet. The new perforated asbestos-cement sheets were used by Woodcrest, with the approval of the defendant.

Woodcrest's claim for an increase in the contract price and a time extension on account of this substitution was denied by the Corps of Engineers Board of Contract Appeals on the ground that Woodcrest had failed to prove that the substitution of the perforated asbestos-cement sheets caused any actual delay in the completion of the work or involved any additional cost to Woodcrest.

In the memorandum supporting their motion for summary judgment, the plaintiffs state that the substitute material "was more expensive," but they do not cite any evidence in the administrative record as sustaining this statement. Furthermore, no such proof was noted during the course of an examination of the administrative record.

It necessarily follows that there is no proper basis on which this particular administrative decision could be overruled.

### III—*Other Claims*

In disposing of the consolidated administrative proceedings on July 15, 1966, the Corps of Engineers Board of Contract Appeals denied a claim by Woodcrest for a time extension because part of the delay in the performance of

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the work under the contract was allegedly attributable to adverse weather conditions, and also denied a claim for a time extension and an increase in the contract price because of alleged dimensional discrepancies in the contract drawings.

As the plaintiffs' motion for summary judgment and supporting memorandum do not ask the court to review the administrative decisions mentioned in the preceding paragraph, it is unnecessary to discuss them.

DAVIS, *Judge*, concurring in part and dissenting in part:

I join the court's opinion on the claims under the "Changes" clause. As for the "Changed Conditions" aspect, I agree with Commissioner White that "the Board could reasonably accept, as it did, the Government's evidence as to the date when ground water was first encountered by Woodcrest, and the Government's circumstantial evidence indicating that Woodcrest was not misled by the defendant's erroneous failure to show the ground-water table on the core boring logs." Perhaps the most important piece of evidence on which the Board could, and did, rely was testimony that Woodcrest placed its initial order for the procurement of dewatering equipment five days prior to the time when ground water was first encountered in the performance of the excavation work.[1] As the commissioner said: "This indicated to the Board that Woodcrest expected to encounter ground water and was not misled by the defendant's erroneous failure to show the ground-water table on the core boring logs." In addition, the Board found, permissibly, that (in Commissioner White's words) "Woodcrest's president (who was in charge of the preparation and submission of Woodcrest's bid on the proposed contract) was familiar with Florida and had supervised the performance of construction jobs in different parts of that State, that he knew that the project site was located between and fairly close to the Atlantic Ocean and the Banana River, that he knew that the terrain was flat and low-lying, that he knew that the area had a heavy annual rainfall, that he knew that the subsoil which was to be excavated in connection with the performance of the contract consisted of sand, and that he knew that sandy land absorbs water rather than repels it." To me, all of this adds up to a substantial

[1] There was a conflict as to when ground water was first met; on this point, the Board chose to believe (as it had a right to do) the Government's witnesses rather than plaintiff's president.

basis for the administrative conclusion that plaintiff was not misled. *See Centre Mfg. Co.* v. *United States*, 183 Ct. Cl. 115, 133–34, 135, 392 F. 2d 229, 239, 240–41 (1968) (dissenting opinion); *Sternberger* v. *United States*, 185 Ct. Cl. —, 401 F. 2d 1012 (Oct. 1968); *Koppers Co.* v. *United States*, 186 Ct. Cl. — (Dec. 1968). I would uphold the Board's determination and dismiss the entire petition.

LARAMORE, *Judge*, concurs in the foregoing opinion concurring in part and dissenting in part.

COLLINS, *Judge*, dissenting:

On the authority of the factual situation in *Leal* v. *United States*, 149 Ct. Cl. 451, 276 F. 2d 378 (1960), it is my opinion that the board had substantial evidence for concluding that the contractor was not misled (*compare id. with Woodcrest Constr. Co.*, 66-2 BCA ¶ 5726, at 26,694–96 (ENG BCA 1966)). *See Morrison-Knudsen Co.* v. *United States*, 170 Ct. Cl. 712, 345 F. 2d 535 (1965); *cf. Fort Sill Associates* v. *United States*, 183 Ct. Cl. 301, 307–08 (1968).

CONCLUSION OF LAW

For the reasons set out, we conclude that the Corps of Engineers Board of Contract Appeals' decision on the "Changed Conditions" cause of action was not based on substantial evidence, and thus, its determination that plaintiffs were not entitled to recover is reversed. We uphold the Board's decision, however, on the "Changes" cause of action, since it was supported by substantial evidence.

Accordingly, plaintiffs' motion for summary judgment on the "Changes" cause of action is denied, defendant's cross-motion is granted, and the case is dismissed as to this cause of action.

As to the "Changed Conditions" cause of action, the court grants plaintiffs' motion for summary judgment on the issue of liability, and denies defendant's cross-motion, with proceedings suspended for 90 days pending the Board's determination of plaintiffs' recovery consistent with our opinion. Plaintiffs will comply with Rule 100 and the appropriate provisions of the General Order of the court of April 1, 1968, implementing it. Upon the conclusion of the Board's proceedings, plaintiffs will report the result to the court, and the parties will take further action for the final disposition of the case in this court.

# APPENDIX B

In the United States Court of Claims

No. 32–67

(Filed April 17, 1968)

WOODCREST CONSTRUCTION COMPANY, INC., AND THE HOME INDEMNITY COMPANY v. THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT *
ON PLAINTIFFS' MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

*Albert Foreman,* attorney of record for plaintiffs. *M. Carl Levine, Morgulas & Foreman,* of counsel.

*H. Thomas Greene,* with whom was *Assistant Attorney General Edwin L. Weisl, Jr.,* for defendant.

## OPINION

### *Introductory Statement*

WHITE, *Commissioner:* The court is called upon in this case to review, under the standards prescribed in the so-called Wunderlich Act (41 U.S.C. §§ 321, 322 (1964)), certain decisions that were rendered by the Corps of Engineers Board of Contract Appeals in

*The opinion and recommended conclusion of law are submitted pursuant to order of the court under Rule 54(b). The facts are stated in the opinion.

an opinion which was dated July 15, 1966 and which disposed of consolidated proceedings (ENG BCA Nos. 2616, 2627, 2631, 2644, and 2645) under the "Disputes" provision of a Government construction contract.

Well in advance of the time (July 31, 1967) when the plaintiffs' motion for summary judgment and supporting memorandum were filed, plaintiffs' counsel was furnished a copy of the then-new rules of the court (Chapter XVIII) governing the procedure in cases involving the review of administrative decisions under the Wunderlich Act, and was specifically informed that the plaintiffs' motion for summary judgment and supporting memorandum or brief in this case should be prepared in accordance with Rule 96(b)(2) and (3). Notwithstanding this directive, the plaintiffs' motion for summary judgment and supporting memorandum are quite deficient with respect to meeting the requirements of Rule 96(b)(2) and (3) as to clarity and specificity. It would not be inappropriate to deny the plaintiffs' motion on this ground. *Sundstrand Turbo* v. *United States*, No. 300-65, decided January 19, 1968, p. 26 of slip opinion.

Nevertheless, the plaintiffs' submission has been carefully studied in an effort to ascertain just which administrative decisions are objected to by the plaintiffs, the bases on which the plaintiffs believe that the administrative decisions should be overturned by the court, and the portions of the administrative record that are pertinent. Following this study, it must be concluded that the plaintiffs have failed to establish their right to recover in the present litigation.

The contract in question was numbered DA-08-176-ENG-(NASA)-36. It was entered into on or about September 24, 1963 between the plaintiff Woodcrest Construction Company, Inc. (which will usually be referred to hereafter in the opinion as "Woodcrest"),

and the defendant (represented by a contracting officer of the Corps of Engineers, Department of the Army). The contract called for the construction by Woodcrest of additions to the Central Control Building and the Telephone Exchange Building at the Cape Canaveral (now Cape Kennedy) Missile Test Annex, Air Force Missile Test Center, Patrick Air Force Base, Florida, for a total compensation that was originally estimated as $797,310. (For the sake of convenience, the contract previously mentioned will usually be referred to hereafter in this opinion as "the contract.")

Notice to proceed under the contract was issued to Woodcrest by the contracting officer on October 1, 1963.

Woodcrest duly entered upon the performance of the work called for in the contract. However, prior to the completion of the work, Woodcrest's right to proceed under the contract was terminated by the contracting officer for alleged default. Thereupon, The Home Indemnity Company, which was Woodcrest's surety and is a co-plaintiff with Woodcrest in the present litigation, completed the work under the contract.

*"Changed Conditions" Claim*

The contract required Woodcrest to perform a considerable amount of excavation work preparatory to the construction of the additions to the Central Control Building and the Telephone Exchange Building. Ground water was encountered by Woodcrest in certain subsurface areas during the course of the excavation work. As a result, it was necessary for Woodcrest to engage in dewatering operations, and these operations allegedly increased the cost and the time involved in the performance of the contract above what they otherwise would have been.

Woodcrest submitted to the contracting officer a claim for relief under the "Changed Conditions" provision of the contract. This provision was in the customary form and provided for the making of an "equitable adjustment" if Woodcrest encountered "(a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract." The "Changed Conditions" provision further stated that if Woodcrest and the contracting officer failed to agree upon the adjustment to be made, the dispute should be determined as provided in the "Disputes" provision of the contract.

Woodcrests's "changed conditions" claim sought an increase in the contract price and also an extension of the time prescribed in the contract for the performance of the work. (The time extension, if granted, would have resulted in a refund of liquidated damages previously assessed by the defendant because of the failure to complete the work under the contract on time.)

The contracting officer disapproved Woodcrest's claim. Woodcrest then appealed under the "Disputes" provision of the contract to the Corps of Engineers Board of Contract Appeals (representing the Secretary of the Army for the handling of such matters).

After holding a hearing, the Corps of Engineers Board of Contract Appeals on July 15, 1966 denied Woodcrest's appeal relative to the "changed conditions" claim. The denial of the appeal was based upon an ultimate factual finding by the Board to the effect that Woodcrest knew or should have known of the existence of a high ground-water table at the project

site, and was not misled by the defendant's erroneous failure to show the ground-water table on the core boring logs.

Under the standard prescribed in the first section of the Wunderlich Act (41 U.S.C. § 321 (1964)), the problem before the court is to ascertain whether the Board's factual finding referred to in the preceding paragraph of this opinion was or was not supported by substantial evidence in the record that was before the Board (the plaintiff having failed to show that the Board's finding was fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith).

The portions of the administrative record cited by the parties in their motions and supporting briefs as being pertinent to this inquiry, as well as other portions of the record, have been carefully examined. The facts clearly disclosed by the administrative record will be summarized first, and consideration will then be given to certain matters which require a weighing of conflicting evidence.

The site where the work was to be performed under the contract consisted of flat, sandy terrain. The project site was located between and fairly close to the Atlantic Ocean and the Banana River, being about two miles west of the Atlantic Ocean and about one-half mile east of the Banana River. The ground surface at the project site was approximately 10 feet above sea level, on the average.

As a preliminary to the construction of the building additions called for in the contract, it was necessary for Woodcrest to excavate in certain areas to depths near or below sea level.

Prior to the issuance of the invitation for bids on the proposed contract, the defendant performed, or caused to be performed, at the project site on April 19,

1963, two core borings for the purpose of determining subsurface conditions. Core boring No. 1 disclosed that the subsurface consisted of sand from the top of the hole, at an elevation of 8.4 feet above sea level, down to a point 27.6 feet below sea level; then there was a stratum of clay down to a point 29 feet below sea level; and then there was more sand down to the bottom of the hole, at a point 31.6 feet below sea level. Core boring No. 2 disclosed sand from the top of the hole, at an elevation of 8.4 feet above sea level, down to a point 27.3 feet below sea level; then there was a stratum of clay down to a point 28.9 feet below sea level; and then there was more sand down to the bottom of the hole, at a point 31.6 feet below sea level. The ground-water table was encountered in both borings at a point about 3 feet above sea level.

The invitation for bids which was distributed by the defendant to Woodcrest and others in connection with the proposed contract included various contract drawings. One of these drawings contained what purported to be core boring logs showing the results of the core borings mentioned in the preceding paragraph. The data shown on the core boring logs were accurate—except that the logs erroneously failed to show the ground-water table. (The inference is warranted that this omission was inadvertent, rather than intentional.)

Woodcrest, after being awarded the contract, began the excavation work at the site of the addition to the Telephone Exchange Building. In performing this work, Woodcrest encountered ground water at a relatively early stage of the excavation work and at a point about 3 feet above sea level. This was called to the attention of the defendant's personnel at the job site on the following day. Dewatering operations in this area were necessary, and Woodcrest installed and utilized dewatering equipment for this purpose.

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As the excavation work progressed, Woodcrest encountered ground water in certain other areas at the site of the addition to the Telephone Exchange Building, in some areas at the site of the addition to the Central Control Building, and also in some exterior areas where excavation work was done in connection with the placement of communication ducts, manholes, etc. In all instances, the ground water was encountered at approximately the same elevation above sea level. The encountering of ground water in various excavated areas made it necessary for Woodcrest to procure and use additional dewatering equipment. Once the dewatering equipment was installed, it had to be kept in operation 24 hours a day, 7 days a week, so that the affected areas could be kept dry and Woodcrest could proceed with its work. The cost to Woodcrest of procuring and operating the dewatering equipment amounted to thousands of dollars.

It was necessary for Woodcrest to perform dewatering operations in about one-third of the excavated area for the addition to the Telephone Exchange Building, and in about one-tenth of the excavated area for the addition to the Central Control Building. The remaining portions of the areas excavated for those building additions were dry.

The facts heretofore summarized in the opinion are clearly reflected in the administrative record. They show that Woodcrest encountered (in the language of the "Changed Conditions" provsions of the contract) "subsurface or latent physical conditions at the site differing materially from those indicated in" a contract drawing. However, this did not necessarily entitle Woodcrest to an equitable adjustment under the "Changed Conditions" provision of the contract. It was a further prerequisite that Woodcrest show that it was misled by the defendant's erroneous fail-

ure to show the ground-water table on the core boring logs. *General Contracting Corp.* v. *United States*, 88 Ct. Cl. 214, 247 (1939). *Leal* v. *United States*, 149 Ct. Cl. 451, 460, 276 F. 2d 378, 383 (1960).

Woodcrest's president testified that, in connection with the preparation of Wodcrest's bid on the proposed contract pursuant to the defendant's invitation, Woodcrest's personnel relied on the accuracy of the information shown on the defendant's core boring logs with respect to the subsurface conditions at the project site; that Woodcrest did not make, or cause to be made, an independent investigation relative to the subsurface conditions; that as the defendant's core boring logs did not show the ground-water table as having been encountered during the course of the two borings, Woodcrest's personnel concluded that dewatering would not be a problem within the excavated areas; and, consequently, that in computing the amount of Woodcrest's bid on the proposed contract, Woodcrest's personnel did not include any sum to cover anticipated dewatering costs.

Despite the testimony referred to in the preceding paragraph, the Corps of Engineers Board of Contract Appeals concluded that Woodcrest actually anticipated that ground water would be encountered during the course of the excavation work and, therefore, was not misled by the defendant's erroneous failure to show on the core boring logs that the ground-water table had been encountered in both of the core borings at an elevation of about 3 feet above sea level. This was known (according to the Board's analysis of the evidence) by the circumstance that Woodcrest placed its initial order for the procurement of dewatering equipment prior to the time when ground water was first encountered in the performance of the excavation work.

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The evidence before the Corps of Engineers Board of Contract Appeals indicated that dewatering equipment was first ordered by Woodcrest on October 18, 1963. However, there was a conflict in the evidence as to when Woodcrest first encountered ground water in the course of performing the excavation work. Woodcrest's president testified on the basis of his recollection that ground water was first encountered on October 14, 1963. Contrary evidence was presented on behalf of the Government to the effect that logs maintained by Government personnel relative to the progress of the work under the contract showed that ground water was first encountered on October 23, 1963. The Board elected to accept the Government's evidence on this point, and thus concluded that Woodcrest had ordered dewatering equipment 5 days before ground water was actually encountered in the course of performing the excavation work. This indicated to the Board that Woodcrest expected to encounter ground water and was not misled by the defendant's erroneous failure to show the ground-water table on the core boring logs.

Pertinent to the Board's conclusion mentioned in the preceding paragraph was evidence indicating that Woodcrest's president (who was in charge of the preparation and submission of Woodcrest's bid on the proposed contract) was familiar with Florida and had supervised the performance of construction jobs in different parts of that State, that he knew that the project site was located between and fairly close to the Atlantic Ocean and the Banana River, that he knew that the terrain was flat and low-lying, that he knew that the area had a heavy annual rainfall, that he knew that the subsoil which was to be excavated in connection with the performance of the

contract consisted of sand, and that he knew that sandy land absorbs water rather than repels it.

The Board's determination on the point now under consideration was a factual one, and was based upon a weighing of conflicting evidence in the record before the Board. The Board could reasonably have accepted the testimony of Woodcrest's president concerning the reliance that was placed by Woodcrest on the accuracy of the information shown on the defendant's core boring logs relative to subsurface conditions, and concerning the date on which ground water was first encountered in the performance of the excavation work. This was substantial evidence. On the other hand, the Board could reasonably accept, as it did, the Government's evidence as to the date when ground water was first encountered by Woodcrest, and the Government's circumstantial evidence indicating that Woodcrest was not misled by the defendant's erroneous failure to show the ground-water table on the core boring logs. This was also substantial evidence. In such a situation, this court is not empowered to make an independent evaluation of the evidence. On the contrary, the court is required by the first section of the Wunderlich Act (41 U.S.C. § 321 (1964)) to accept as final and conclusive the Board's determination based on substantial evidence, even though there was other conflicting evidence of a substantial nature before the Board that would have justified a contrary determination.

It must be concluded that the decision made by the Corps of Engineers Board of Contract Appeals on the "changed conditions" claim was supported by substantial evidence in the record that was before the Board, and, therefore, is binding on the court. It necessarily follows that the plaintiffs have failed to establish their entitlement to recover on this claim in the present litigation.

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*"Changes" Claims*

In its opinion dated July 15, 1966, the Corps of Engineers Board of Contract Appeals also rendered decisions on claims submitted by Woodcrest under allegations that, as the result of erroneous interpretations by the defendant's personnel of contract drawings or specifications, Woodcrest had been required to do extra work, or to use types of materials, not contemplated by the pertinent contract drawings or specifications, as properly interpreted. These claims sought increases in the contract price and also time extensions for the performance of the work under the contract (with resulting diminutions of the liquidated damages assessed by the defendant because of delay in the completion of the work).

The claims mentioned in the preceding paragraph were apparently for "equitable adjustments" under the "Changes" provision of the contract. This provision stated in part as follows:

> The Contracting Officer may, at any time, by written order * * * make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. * * * If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions [relating to "Disputes"] * * *.

Although the contracting officer did not, as contemplated in the "Changes" provision, issue written change orders with respect to the matters now under consideration, it was evidently Woodcrest's theory that the extra items of work, or the more expensive

materials, required of it as a result of the allegedly erroneous interpretations of contract drawings or specifications should be regarded as flowing from constructive changes in the pertinent contract drawings or specifications and, therefore, as compensable under the "Changes" provision of the contract. *Cf. The Jack Stone Co.* v. *United States,* 170 Ct. Cl. 281, 291–292, 344 F. 2d 370, 376 (1965); *Gholson, Byars and Holmes Construction Co.* v. *United States,* 173 Ct. Cl. 374, 388–390, 351 F. 2d 987, 994–996 (1965); *Turnbull, Inc.* v. *United States,* 180 Ct. Cl. 1010, —— (1967).

Woodcrest's "changes" claims were denied by the Corps of Engineers Board of Contract Appeals on July 15, 1966. As the Board's decisions on these claims involved (with one exception) the interpretation of contract drawings or specifications, the administrative decisions related to questions of law, and the Board's decisions are not binding on the court, which is authorized by the second section of the Wunderlich Act (41 U.S.C. § 322 (1964)) to consider these legal questions *de novo. Schmid* v. *United States,* 173 Ct. Cl. 302, 309, 351 F. 2d 651, 654 (1965); *Merritt-Chapman & Scott Corp.* v. *United States,* 174 Ct. Cl. 250, 254, 355 F. 2d 622, 624 (1966).

The several "changes" claims will be discussed separately in subsequent paragraphs of this opinion.

*Manholes:* One of Woodcrest's "changes" claims involved the question of whether the contract drawings, as properly interpreted, called upon Woodcrest to construct a couple of communication manholes, designated as C–1 and C–4.

The contract, in addition to calling for the construction of additions to the Central Control Building and the Telephone Exchange Building, also involved the construction of certain related works. Among these were some communication ducts and manholes.

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The invitation for bids which the defendant furnished to Woodcrest and others prior to the submission of bids on the proposed contract included numerous drawings relating to the work that was to be performed under the contract. These drawings were subsequently incorporated in, and became part of, the contract.

Sheet 1 of the contract drawings contained (among other things) a legend that explained the meaning of various symbols used on other contract drawings. In connection with "Communication Ducts & Manhole," the legend indicated that the symbol for an "existing" communication manhole was a small square with the inner space clear, and that the symbol for a "new" communication manhole was a small square with the inner space cross-hatched.

Sheet 2 of the contract drawings was denominated the "Site Plan." This sheet depicted (among other things) small squares that symbolized four communication manholes, Nos. C–2, C–3, C–4, and C–5. The squares symbolizing Nos. C–2, C–3, and C–5 were cross-hatched, thus indicating that these were "new" communication manholes. The symbol for No. C–4 was clear, thus indicating that this was an "existing" manhole.

Sheet 33 of the contract drawings was denominated "Communication Distribution." This sheet contained (among other things) diagrams indicating the manner of construction for five communication manholes, Nos. C–1, C–2, C–3, C–4, and C–5.

In the presentation of this particular claim, Woodcrest asserted before the Corps of Engineers Board of Contract Appeals that in the preparation of its bid, it relied on sheet 2 of the drawings as showing that communication manholes Nos. C–2, C–3, and C–5 were "new" and were to be constructed under the contract,

as showing that manhole No. C–4 was an "existing" facility and was thus outside the scope of the contract, and as implying that manhole No. C–1 was an "existing" facility since it was not shown on the site plan. However, it subsequently turned out that communication manholes Nos. C–1 and C–4 were not in existence, and Woodcrest was required by the defendant to construct these manholes. To Woodcrest, this amounted to extra work which entitled it to additional compensation and additional time for the completion of the contract. However, the Board denied the claim, holding that "Sheet 33 was the controlling drawing for construction of the manhole system."

In this case, there was an obvious discrepancy between, on the one hand, sheet 2 of the contract drawings—the "Site Plan"—which clearly indicated that communication manhole No. C–4 was an "existing" facility and omitted No. C–1, and, on the other hand, sheet 33—relating to "Communication Distribution"—which furnished instructions concerning the manner in which communication manholes Nos. C–1 and C–4 were to be constructed and thus clearly indicated that they were within the scope of the work to be performed under the contract. In such a situation, it was incumbent upon Woodcrest, in connection with the submission of its bid, to obtain a clarification from the defendant by making an inquiry as to whether communication manholes Nos. C–1 and C–4 were actually in existence and thus outside the scope of the work to be done under the contract, or whether these were new facilities which the successful bidder would be expected to construct under the contract. *Beacon Construction Co.* v. *United States,* 161 Ct. Cl. 1, 7, 314 F. 2d 501, 504 (1963); see *Blount Bros. Construction Co.* v. *United States,* 171 Ct. Cl. 478, 496, 346 F. 2d 962, 972–973 (1965).

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Under the circumstances, it appears that the court would not be justified in overruling the reasonable administrative interpretation to the effect that sheet 33 of the contract drawings, which related specifically to the communication system, "was the controlling drawing for construction of the manhole system."

*Chair Covering:* The addition to the Central Control Building was to contain a theater, with chairs installed by Woodcrest. One of Woodcrest's "Changes" claims involved the question of whether certain technical provisions in the contract specifications, as properly interpreted, made it necessary for Woodcrest to afford the defendant an opportunity to select the fabric for use as the covering for the theater chairs.

Section 37 of the technical provisions related to "Seating." The introductory portion of paragraph 37–02, dealing with "Materials," declared that:

> Chairs shall be constructed as here-in after specified or equal to TC–616 SCHOLASTIC chairs as manufactured by Heywood-Wakefield Company, Menomince [sic], Michigan.

Subparagraph "b" of paragraph 37–02 provided in part as follows:

> The back shall consist of two parts—*upholstered panel* and metal back. The *upholstered panel* shall be of plywood * * * and covered with a 3″ wide layer of felted cotton extending across the top and down both sides securely fastened to plywood. The entire front surface of plywood shall then be covered with a rubberized curled hair pad one inch in thickness overall, and with a rubberized wool topper approximately ¼″ thick, *and the selected upholstering fabric.* * * * [Emphasis supplied.]

Paragraph 37–03 required that shop drawings be submitted for approval, and further said that "Draw-

ings shall include shop and erection drawings, including * * * *type of fabric* * * *" (emphasis supplied).

Paragraph 37–04 provided that "Samples as required shall be submitted to the Contracting Officer for approval."

Woodcrest proposed to furnish the TC–616 SCHOLASTIC chairs manufactured by the Heywood-Wakefield Company. The manufacturer produced this chair as a standard item with a muslin covering, and also produced it at a slightly higher price with a rather wide choice of fabrics for the covering. Woodcrest desired to use the standard chair with the muslin covering, but the defendant insisted that it had the right under the pertinent technical provisions to select a fabric for the chair covering. Woodcrest was ultimately required to provide theater chairs with a covering made of fabric selected by the defendant.

The Corps of Engineers Board of Contract Appeals denied Woodcrest's claim for an increase in the contract price because of the requirement that the more expensive fabric be used as the covering for the theater chairs.

The Board's interpretation of the pertinent technical provisions was proper. Paragraph 37–03 clearly indicated that the shop drawings should include a proposed "type of fabric" for the approval of the defendant, and subparagraph "b" of paragraph 37–02 provided for the use of "the selected upholstering fabric."

*Duct Bank:* Another of the "changes" claims sought an increase in the contract price and a time extension on the basis of allegations that after Woodcrest had drilled the holes for a duct bank in the cable vault of the addition to the Telephone Exchange Building, it was required by the defendant to redrill the holes and reinstall the ducts.

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The Corps of Engineers Board of Contract Appeals denied this claim on the ground that the original installation of the duct bank was not accomplished in accordance with the requirements of the pertinent contract drawing.

The plaintiffs, in their motion and supporting memorandum, have not pointed out in what respect the administrative decision on this point is erroneous, and the portions of the administrative record examined do not disclose any proper basis on which the decision could be overruled.

*Asbestos-Cement Sheets:* In another claim, Woodcrest sought from the administrative agency an increase in the contract price and a time extension because the contract specifications called for a type of asbestos-cement material that was no longer being manufactured, and it was necessary to use a substitute material.

The contract specifications called for the use of asbestos-cement sheets conforming to Federal Specification SS–S–283. After Woodcrest began the performance of the work under the contract, it was learned that Federal Specification SS–S–283, which related to a solid asbestos-cement sheet, had been superseded by Federal Specification SS–B–755, which related to a perforated asbestos-cement sheet. The new perforated asbestos-cement sheets were used by Woodcrest, with the approval of the defendant.

Woodcrest's claim for an increase in the contract price and a time extension on account of this substitution was denied by the Corps of Engineers Board of Contract Appeals on the ground that Woodcrest had failed to prove that the substitution of the perforated asbestos-cement sheets caused any actual delay in the completion of the work or involved any additional cost to Woodcrest.

In the memorandum supporting their motion for summary judgment, the plaintiffs state that the substitute material "was more expensive," but they do not cite any evidence in the administrative record as sustaining this statement. Furthermore, no such proof was noted during the course of an examination of the administrative record.

It necessarily follows that there is no proper basis on which this particular administrative decision could be overruled.

*Other Claims*

In disposing of the consolidated administrative proceedings on July 15, 1966, the Corps of Engineers Board of Contract Appeals denied a claim by Woodcrest for a time extension because part of the delay in the performance of the work under the contract was allegedly attributable to adverse weather conditions, and also denied a claim for a time extension and an increase in the contract price because of alleged dimensional discrepancies in the contract drawings.

As the plaintiffs' motion for summary judgment and supporting memorandum do not ask the court to review the administrative decisions mentioned in the preceding paragraph, it is unnecessary to discuss them.

*Conclusion*

For the reasons previously set out in this opinion, it appears that the plaintiffs' motion for summary judgment should be denied, that the defendant's cross-motion for summary judgment should be allowed, and that the petition should be dismissed.

# APPENDIX C

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20315

Before the Corps of Engineers Board of Contract Appeals

Appeals of

WOODCREST CONSTRUCTION CO., INC.

Contract No. DA-08-176-ENG(NASA)-36

ENG BCA Nos. 2616, 2627, 2631, 2644 and 2645

*Appearances for the Appellant:* M. Carl Levine, Morgulas & Foreman By Albert Foreman, Esq., New York, New York.
*Appearances for the Government:* Edwin Kircher, Jr., Esq., Merritt Island, Florida.

OPINION BY MR. GRANT

Here we consider five appeals arising under a contract for modifications and additions to the Central Control Building and Telephone Exchange Building at the Cape Canaveral Missile Test Annex, Air Force Missile Test Center, Patrick Air Force Base, Florida. The contract, in the total estimated amount of $797,310.00, was awarded on 24 September 1963. Notice to proceed was issued on 1 October 1963.

Paragraph SC–1 of the contract set forth the following Construction Completion Schedule:

| Item of Work | Completion, Joint Occupancy, or Beneficial Occupancy Date | Liquidated Damages |
|---|---|---|
| 1. Beneficial Occupancy of Telephone Central Office Equipment Room. | 15 November 1963 | $150.00 |
| 2. Joint Occupancy of Southerly Addition To Telephone Exchange Building. | 15 January 1964 | $100.00 |
| 3. Completion of Telephone Exchange Building Addition and Auxiliary Work. | 15 February 1964 | $200.00 |
| 4. Joint Occupancy of Central Control Building Addition | 8 May 1964 | $150.00 |
| 5. Completion of Central Control Building Addition and Auxiliary Work. | 8 June 1964 | $250.00 |

By modifications the specified completion or occupancy dates were extended. The contractor failed to meet any of them. It completed items 1, 2 and 4 late. Items 3 and 5 were completed by the contractor's bonding company, The Home Indemnity Company, after the Government's termination for default of appellant's right to proceed. Following are the contract completion dates, as extended by modifications, and actual completion dates.

| Item | Contract Completion Date as Extended | Actual Completion Date |
|---|---|---|
| 1 | 18 November 1963 | 22 November 1963. |
| 2 | 21 January 1964 | 13 March 1964. |
| 3 | 28 February 1964 | 27 October 1964 (Completed by Home Indemnity Company) |
| 4 | 26 June 1964 | 26 July 1964. |
| 5 | 30 July 1964 | 15 January 1965 (Completed by Home Indemnity Company). |

Under paragraph SC–4—Liquidated Damages—the Contracting Officer withheld from progress payments liquidated damages assessable on uncompleted items. Retained percentages were withheld from progress payments pursuant to General Provision 7—Payments to Contractor. Liquidated damages amounted to $69,850 against Woodcrest and $51,900 against the bonding company.

## Summary of the Appeals

The major single item of claim (included in *ENG BCA 2644*) is that for improper termination. This claim is based on Woodcrest's contention that it was entitled to extensions of time totaling 186 days which, if granted, would have placed its job progress on schedule. Three of the five appeals (Eng BCA 2616, 2645, 2644) deal with one or more items for which a claim for time extension is included in *ENG BCA 2644*.

In *ENG BCA 2616* the contractor claims that it encountered a changed condition (ground water) which delayed its work and for which it was entitled to a time extension in addition to dewatering costs in the sum of $62,286.29 and overtime and premium costs amounting to $78,753.21 allegedly expended in efforts to adhere to the original progress schedule.

The contractor alleges, under *ENG BCA 2627*, that it is entitled to a time extension of 12½ days for delays due to adverse weather conditions.

Under *ENG BCA 2631* it contends that it was delayed 13 days in completion of the Central Control Building by reason of dimensional discrepancies in the contract drawings. It further alleges, without setting forth a specific money demand, that failure of the Contracting Officer to grant such time extension caused the contractor to expedite its work unnecessarily.

*ENG BCA 2645* involves a claim for $13,850.00 for alleged extra work in cutting back a duct bank and reinstalling ducts in the cable vault. An additional unspecified amount of time for this work is included in the 186-day time extension sought in *ENG BCA 2644*.

In ENG BCA 2644, Woodcrest asserts that the default termination was improper in light of the Gov-

ernment's failure to allow time extensions totaling 186 days for the following items [the figures appearing beside certain items are included money demands for extra work.]

1. Modification to theatre seat fabric in Central Control Building—$263.25.
2. Construction of Manholes C–1 and C–4—$13,197.00.
3. Change in asbestos cement flexboard—$33.00.
4. Dewatering in connection with changed condition—(ENG BCA 2616).
5. Cutting back duct bank and reinstalling ducts—(ENG BCA 2645).

*ENG BCA 2644* also includes money demands for $78,753.21 covering alleged acceleration [this appears to be a duplication of acceleration costs claimed in ENG BCA 2616] and $200,000.00 for sums allegedly expended by the bonding company to complete the contract over and above "that which would have been required if the Contractor had been permitted to complete the contract."

We now proceed to consider each appeal separately.

## ENG BCA 2616

### Dewatering to Cope With Alleged Changed Condition

The logs of borings included in the contract drawings did not show any ground water elevation although subsurface investigation by the Government had revealed the presence of water at elevation +3. Woodcrest claimed that in preparing its bid, it relied on the absence of indication of ground water and, therefore did not include an item for dewatering. Appellant's prebid site investigation was limited to a hasty visit by a Mr. Tepper on the day before bid

opening. Mr. Tepper was a friend of Harvey Borsuk, Vice President of Woodcrest. He was a marketing representative for Westinghouse Corporation dealing with NASA at Cape Canaveral. He had a degree in electrical engineering but, apparently, no experience in subsurface aspects of building construction. He was asked by the Borsuks (Abner Borsuk, President of Woodcrest, and his son, Harvey) to take "a general look" around the work site, "to make sure the buildings were standing upright, to make sure the pavement hadn't sunk in the ground, to look around the buildings for water, to look at any parts of this area where the existing structures were to see if there was anything that met the eye that didn't look normal." Tepper made the inspection in a very few minutes on his way to work at the Westinghouse office. He reported to Harvey Borsuk that everything looked normal, that he had seen no water and that the ground looked dry.

It appears that the first attempt by Woodcrest to make a site investigation occurred on 14 September, a Saturday. This attempt was frustrated by its officers' lack of security clearance and the unavailability of Government personnel to furnish such clearance on Saturday and Sunday.

The contractor claims to have encountered water during probing operations on 14 October 1963. Appellant's field logs fail to support the date asserted. Government logs show that water was first encountered on 23 October. This occurred in the southerly section of the southeast addition to the Telephone Exchange Building. Water was encountered at approximately the same elevation in other areas of the work. Dewatering was required mainly in three areas: about ⅓ of the area of the addition to the Telephone Exchange Building; in the vault area of

the Central Control Building addition (about 1/10 of the area of that addition); and areas exterior to buildings where work was done on communication ducts, manholes, underground power lines and Ricwil piping.

On 18 October 1963, five days before ground water was "discovered", appellant ordered two pumps and other wellpointing equipment from Foundation Wellpointing Corporation.

Abner Borsuk testified that installation and movement of dewatering equipment took 27 days at the Central Control Building addition and 42 days at the Telephone Exchange Building addition. He did not testify that these were the periods of actual delay to the respective items of work. In fact the record is devoid of proof of actual over-all delay to the entire project or any individual item thereof as a result of the ground water condition. What little evidence of delay the contractor did produce does not preponderate over the Government's evidence that the relatively small areas of the project affected by water could have been and, in fact, were dewatered without interference with the orderly progress of the work. While dewatering was taking place, the work was being advanced in other areas.

The Government admits the lack of information as to the subsurface water in the logs of borings and also acknowledges that it had made previous subsurface investigations which showed the water table at approximately +3 elevation. It argues, however, that the omission of such information from the drawings does not automatically entitle the contractor to additional compensation. It calls to our attention the principles that entitlement does not occur unless the omission misleads the contractor (*Ragonese* v. *U.S.*, 128 C. Cls. 156) and that an adjustment is not proper where the

contractor either knew or should have known of the existence of the subsurface condition giving rise to the claim (*Alvin H. Leal* v. *U.S.*, 149 C. Cls. 451).

The evidence here convinces us that appellant should have known of and anticipated the existence of the water table encountered. Abner Borsuk testified that prior to bidding on this project he had seen various drawings relative to other projects on Merritt Island which indicated water and water level and assumed that "if a water condition existed here, it would also be reflected on the sheet [logs of borings] here." Borsuk was very familiar with Florida and had engaged in construction elsewhere in the state. Although he did not make a personal prebid investigation, he must have known that the project site was almost completely surrounded by considerable bodies of water, viz., the Banana River and the Atlantic Ocean. The project site was on flat, sandy terrain located about 2 miles from the ocean and ½ mile from the Banana River. Ground elevation at the site was approximately 10 ft. above sea level. The project required excavation in certain areas to depths near or below sea level. The logs of borings showed sand to a depth of approximately 30 ft. It is quite elementary hydrologic knowledge that water percolates sidewise through sand as well as down and that capillary action causes water to creep up through sand to a level above sea level. Water was visible in ditches along the roadways leading to the site. The existence of ground water at high elevations was common knowledge among construction contractors who had worked on the Cape, as well as Government representatives involved in construction work there. In spite of all these indications which we think would have led a reasonably prudent prospective bidder to wonder seriously about

the presence of water, the record fails to disclose any inquiry made by appellant as to its existence.

Appellant's ordering of wellpointing equipment prior to the actual encountering of ground water tends to show that it was not, in fact, misled by the absence of ground water indications on the logs of borings.

Careful consideration of the evidence leads us to the conclusion that there were so many factors known or readily available to appellant on which the presence of a high water table could have been predicted, that appellant knew or should have known of the existence thereof.

The appeal is denied.

## ENG BCA 2627

### Delays Due to Adverse Weather

The parties agreed that the Board should consider this appeal solely on the written record in accordance with the Board's Rule 4(c).

Appellant claims that adverse weather conditions prevented accomplishment of any work on 15, 16 and 25 October, 25 November, 17, 24 and 31 December 1963, 7 and 12 January and 1 and 4 May 1964. It further claims half days lost due to weather conditions on 7 and 11 November 1963 and 17 January 1964. It asks for an extension of time of 12½ days.

General Provision 5 of the contract (Termination for Default-Damages for Delay-Time Extensions) provided, among other things, that the contractor's right to proceed should not be terminated nor the contractor charged with resulting damage if "the delay in completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor, including

but not restricted to . . . unusually severe weather." The Contracting Officer denied the claim finding that although it did rain on most of the days specified, the weather on those dates was not unusually severe. He also found that daily inspection reports showed that all work progressed as usual on 15, 16 and 25 October, 7 and 11 November 1963 and 4 May 1964. Under Modification No. 9, a one-day time extension was allowed, for delay on 25 November 1963, not because of unusually severe weather but because it was a national day of mourning for the death of President Kennedy.

Appellant has produced no evidence to controvert the findings of the Contracting Officer.

The appeal is denied.

## ENG BCA 2631

### Acceleration-Discrepancies in Drawing Dimensions

On 6 November 1963, the contractor discovered certain discrepancies in the contract drawing dimensions relating to the dimensions of the elevator pit portion of the Central Control Building addition. The area of the elevator pit was approximately 10 ft. by 10 ft. The over-all dimensions of the addition were 97 ft. by 89.5 ft. The discrepancies arose from the fact that one dimension of the existing Central Control Building was 0.57′ (+7″) longer than shown on the drawings.

At the time the discrepancies were discovered, appellant had just started layout work on the Central Control addition. Appellant was instructed to proceed with the layout work on the unaffected portions of the addition and was advised that directions as to resolution of the discrepancies would be furnished on or before 13 November 1963.

Appellant continued layout work and construction of footings on the unaffected portion of the building. Construction of the elevator pit involved driving sheet piling and pouring a wall over the piling. Nothing could be done on the pit until the discrepancies were resolved.

Resolution was accomplished by sketches delivered to appellant's superintendent on 18 November. Formal transmittal of the sketches was made by letter dated 21 November. The letter stated that it was anticipated that the change would not delay completion of performance beyond the date specified in the contract but that a time extension would be granted in the event such delay resulted.

On 30 December 1963, appellant requested an extension of time for an alleged 13-day delay. This covered the period from discovery of the discrepancy to the date revision sketches were delivered to appellant.

Appellant did not start pouring the foundation of the Central Control addition until 21 November. Driving of sheet piling for the elevator pit did not commence until 3 December, fifteen days following the receipt of the revision sketches.

At a meeting with the Resident Engineer on 6 January 1964, Abner Borsuk stated that he had for his own purposes delayed construction of the elevator pit and cable vault in order to facilitate equipment access to the building.

On the acceleration aspect of the appeal the record is lacking in proof.

On the facts presented to us we are unable to find that the dimension discrepancies in question and the time spent by the Government in their resolution resulted in delay in completion of the work or accelerative efforts by the contractor.

The appeal was denied.

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CUTTING BACK DUCT BANK AND REINSTALLING DUCTS

Sheet 32 of the contract drawings provided configuration and control dimensions for installation of 24-way and 48-way duct banks terminating in the southeast wall of the communications cable vault. Ducts of the 24-way duct bank were required to be arranged two wide and twelve high, spaced 5½" center to center and located 4¼" from the northeast wall to the center of the first vertical row of ducts. The 48-way duct bank was shown on the drawing four wide and twelve high with horizontal spacing of 5½" center to center of the first and second vertical rows of ducts; 12½" center to center between the second and third rows; and 5½" center to center between the third and fourth rows. The drawing required a horizontal dimension of 5'–7" from the center line of the 48-way duct bank to the southeast wall and 6'–3" to the northeast wall.

The contractor installed the 24-way duct bank out of plumb leaving up to 9" from the northeast wall to the center of the first row of ducts instead of 4½" as required by the drawings. In a letter dated 30 June 1964 to the Government (in reply to the Government's letter of 24 June directing correction of the installation to conform to the drawing), the contractor stated that at the direction of Government inspectors the bank had been moved over in order to eliminate cutting of corner bars in the concrete reinforcement.

Appellant installed the 48-way duct bank with only 5½" between the second and third vertical rows instead of 12½" as required on the drawing.

By letter dated 21 May 1964 relating to the 48-way bank and 24 June 1964 concerning the 24-way bank, the contractor was advised of these deficiencies and ordered to take necessary action to correct them. Cor-

rective work involved removal and reconstruction of the entire southeast wall of the cable vault. During the corrective work and before reconstruction of the southeast wall, the Government issued change "AG" which reversed the specified horizontal control dimensions of 5'–7" and 6'–3" governing the position of the 48-way duct bank. The change order contained a determination that the change did not decrease or increase the cost of performance nor change the time required for performance.

Appellant, in its letter dated 20 August 1964, demanded a modification allowing it additional compensation in the amount of $13,850.00 for Change "AG" as extra work.

Since Change "AG," which required only a simple reversal of two dimensions governing location of the 48-way duct bank in the wall, was performed during corrective work required by appellant's construction errors and was ordered before the southeast wall was rebuilt, we fail to see how the change could have caused the contractor to incur additional cost. Appellant's evidence fails to establish entitlement in this claim.

The appeal is denied.

## ENG BCA 2644

### EXTRA WORK AND IMPROPER TERMINATION

We shall consider first the extra work items alleged by appellant under this appeal. Although in correspondence appellant asked for a time extension as to but one of these three items, the complaint filed with the Board appears to assert claims for extra time as to all of them as part of the overall-186-day time extension sought for the entire job.

(1) *Modification To Theatre Seat Fabric—$263.25*

The amount demanded represents the cost of finish fabric on theatre chairs installed in the Central Control Building. The chairs which appellant proposed to furnish were covered only in muslin. The manufacturer provided other fabric only at additional cost. The Government insisted that it was entitled to a fabric covering selected from samples rather than the muslin fabric. Appellant, under protest, installed fabric selected by the Government.

The pertinent portions of the contract's technical provisions are as follows:

SECTION 37

SEATING

* * * * *

37–02. MATERIALS: Chairs shall be constructed as here-in-after specified or equal to TC–616 SCHOLASTIC chairs as manufactured by Heywood-Wakefield Company, Menominee, Michigan.

* * * * *

b. Back: The back shall consist of two parts—upholstered panel and metal back. The upholstered panel shall be of plywood . . . covered with a 3" wide layer of felted cotton . . . The entire front surface of plywood shall then be covered with a rubberized curled hair pad . . . and a rubberized wool topper . . . and the selected upholstering fabric.

* * * * *

37–03. SHOP DRAWINGS: Shop drawings shall be submitted for approval . . . Chairs and fastenings shall not be fabricated or delivered to the site before the approved shop drawings shall have been returned to the Contractor. Drawings shall include shop and erection draw-

ings, including gauges and thicknesses, spring tension, type of fabric. . . .

37–04. SAMPLES: Samples as required shall be submitted to the Contracting Officer for approval.

* * * * *

During the pre-work conference on 11 October 1963 the contractor inquired as to samples and selection of materials and colors for seating. By letter of 16 October the Resident Engineer requested the contractor to submit samples for selection of fabric and color. On 22 October, Woodcrest submitted a sample card of material in 13 colors and a sample of brown material. The transmittal letter advised the Government that choice of any materials would increase the contract amount by $263.25. The Resident Engineer, by letter dated 30 October 1963, informed the contractor that the contract required a complete seat including a fabric covering. The material sample and cord were returned without action.

Appellant's shop drawing transmittal 27, dated 5 November 1963, submitted a one-page specification from the seat manufacturer, Heywood-Wakefield. Typewritten at the top of the specifications sheet was the following note inserted by Woodcrest: "Standard Manufacturer's item covered in muslin only—Upholstery material extra." The shop drawing was returned by the Contracting Officer with the note that additional information as to the type of fabric was required. Shop drawing transmittal 54, dated 29 November 1963, submitted additional data including colors and fabric samples. The transmittal was approved and the Government made a fabric selection.

By letter dated 20 February 1964, the contractor submitted data showing that upholstered chair prices quoted by the manufacturer were based on fabric

covering of muslin and that selection of another fabric involved an extra charge.

We think the specifications quite clearly entitled the Government to an upholstery fabric of its own selection at no extra cost.

This item of the claim is without merit.

(2) *Construction of Manholes C–1 and C–4—$13,197.00*

Woodcrest claims that the construction of Manholes C–1 and C–4 was not required by the contract plans and specifications. It relies chiefly on Sheets C–1 and C–2 of the drawings. Sheet C–1 contains a legend which tells that new manholes are depicted on Sheet C–2 in cross-hatched squares and existing manholes in clear squares. Sheet C–2, entitled "Site Plan" depicted Manhole C–4 with a clear square. It did not show Manhole C–1. Appellant says that on the basis of these two drawings it concluded that construction of Manholes C–1 and C–4 was not required.

Sheet 33, entitled "Communication Distribution" showed both Manholes C–1 and C–4, as well as C–2, C–3 and C–5. It contained the details of the entire communications system. It showed profiles, elevations, and details of the various types of manholes to be constructed including Type V–2 (for Manhole C–1) and Type J–4 (for Manhole C–4). Sheet 33 was the controlling drawing for construction of the manhole system.

The requirements for construction of Manholes C–1 and C–4 were so clearly set forth on Sheet 33 as to have imposed on the contractor the duty of inquiry as to the obvious discrepancy between those requirements and the obviously inconsistent information contained on Sheet C–2 (See paragraph 2 of the General Provision of the contract).

Appellant has failed to establish entitlement under this item of appeal.

(3) *Change in Asbestos Flexboard*—$33.00 and 28 days time extension

Paragraph 12-04a.7. of the technical provisions required asbestos-cement sheets to conform to Federal Specification SS–S–283. The material in question was to be installed in the Central Control Addition. On 1 July 1964, the Contractor advised the Resident Engineer that Flexboard (a trade name for asbestos-cement sheets) manufactured by Johns-Manville conforming to the specification cited was no longer available; that the specification had been superseded by Federal Specification SS–B–755, dated 28 June 1963; and that it would take 4 weeks after approval for delivery at an additional cost of $33.00. The letter contained a request for a contract modification increasing the contract price by $33.00 and granting a 4-week time extension.

On 9 July 1964, the Government advised Woodcrest of its approval of a transmittal of a sample of 3/16" perforated flexboard conforming to Federal Specification SS–B–755. The letter containing this advice further stated that sufficient information had not been furnished to substantiate a claim.

The wallboard was delivered to the project and installed by 12 August 1964, prior to termination of appellant's right to proceed.

The contractor has not offered proof that the substitution of the material called for by the new Federal Specification caused actual delay to completion of the project or involved additional cost.

This item of the appeal is denied.

## Improper Termination

The claim here, essentially, is that the Government improperly terminated Woodcrest's right to work on the basis of delinquent progress since the contractor was entitled to time extensions which, if granted, would have placed the job on schedule.

In this appeal and the other appeals considered in this decision we have carefully examined each of the items for which appellant claimed time extensions are due. We have found all of them to be without merit.

The record is replete with evidence to support the propriety of the termination. From the early stages of performance, appellant's progress was seriously behind that contained in the CPM (Critical Path Method) chart which it submitted. The causes of delinquency in progress appear to have been inadequate supervision and failure to control and coordinate the work of subcontractors.

As of 27 December 1963, work was as much as 60 days behind schedule on certain major items on the critical path schedule for the Telephone Exchange Building addition and 30 days behind schedule on major items of the Central Control Building addition.

At a meeting called on 6 January 1964 concerning the contractor's lack of progress, its President admitted that the job was behind schedule and advanced as the reason that his superintendent had not performed according to directions given him. He stated that he had discharged the superintendent and was going to take over the job himself. He promised to furnish a new CPM chart, an operational plan for regaining progress and to put more men on the job. All that was forthcoming was a letter setting forth various items of work and dates by which the contractor expected to finish them. No details were given as to just how these dates were to be met.

From January through the date of termination, appellant's progress was constantly and seriously behind schedule. The Government continually prodded the contractor and threatened consideration of termination on certain occasions.

Throughout performance of the contract appellant had difficulty with subcontractors and suppliers. The most serious trouble was with the electrical portion of the work. The first electrical subcontractor left the job for the entire week, 19–26 December 1963. He pulled off the job completely on 25 February 1964. The record indicates that this difficulty stemmed from the subcontractor's feeling that he wasn't being paid in accordance with his contract. A replacement subcontractor was not secured and working until 19 days later. This contractor was delayed by having to order and obtain certain equipment and during his time on the job failed to maintain adequate progress, due, according to him, to the failure of appellant to make satisfactory payments. He pulled off the job in May 1964 and was replaced 3 to 5 days later by a third electrical subcontractor. This subcontractor was delayed by having to reorder certain material and equipment. In August this subcontractor left the job and work on the contract came nearly to a stop.

The many and serious delays in the electrical work, of course, delayed in turn other work such as floor tiling, hanging ceilings, painting, etc.

The record also shows that appellant had serious difficulties with the following major subcontractors and suppliers in getting them to perform work or deliver supplies: miscellaneous metal, masonry block, reinforcing steel, and construction equipment.

On 31 August 1963, the Government made a complete inspection of the work which by then had come almost to a standstill. It estimated the work as 90 to 92 per cent complete. Three of the five major items of work had been completed—all late, as shown on page 2 of this decision. Numerous important items remained for completion in the Telephone Exchange Building and the Central Control Building.

By letter dated 4 September 1964, the Government terminated for default appellant's right to proceed. As nearly as we can determine, the fault for failure to complete the uncompleted items on time and to demonstrate ability to progress the work to completion within a reasonable time following the 31 August inspection lay with the contractor.

The contractor has made statements to the effect that it was the Government's interference with subcontractors which caused the difficulies which Woodcrest experienced with them. There is no substantial support for these statements in the record.

Woodcrest further says that it was because the Government withheld liquidated damages and retained percentages from progress payments that it was not able to pay subcontractors as quickly and in such amounts, as they wanted. This may be true but the Government was only acting in accordance with the terms of the contract in withholding such sums. In order to assist the contractor as much as possible the Government took the unusual measure of paying him twice monthly instead of monthly.

On the entire record we find no basis for holding the termination to have been improper.

This appeal, therefore, and all items included therein must be *denied.*

Date: 15 July 1966.

QUENTIN E. GRANT,
*Member of the Board.*

I *concur:*

JOHN P. JELLICO,
*Deputy Chairman.*

I *concur:*

HAROLD S. RHIND,
*Member of the Board.*

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I certify that the foregoing is a true copy of the Corps of Engineers Board of Contract Appeals Decisions Nos. 2616, 2627, 2631, 2644 and 2645, appeals of WOODCREST CONSTRUCTION CO., INC., under Contract No. DA-08-176-ENG(NASA)-36.

Date:

GLADYS BYERLY,
For FLORA A. BARTH,
*Recorder.*

U.S. GOVERNMENT PRINTING OFFICE: 1966